



(SOON - credit 9/5)

State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-2032/2
DAK & RLR:kmg:RE

2003 BILL

AN ACT *to repeal* 49.498 (20), *to renumber and amend* 50.04 (5) (a) 6.; *to amend* 50.04 (4) (b) 4., 50.04 (4) (e) 1., 50.04 (5) (title), 50.04 (5) (a) (intro.), 50.04 (5) (a) 1., 2. and 3. (intro.), 50.04 (5) (a) 4., 50.04 (5) (a) 5. a., b. and d., 50.04 (5) (a) 5m., 50.04 (5) (b) (intro.), 50.04 (5) (c), 50.04 (5) (d) (title), 50.04 (5) (d) 1., 50.04 (5) (d) 2. (intro.), 50.04 (5) (dm) (intro.), 50.04 (5) (e), 50.04 (5) (f), 50.04 (5) (fm), 50.04 (5) (fr), 50.04 (5) (g) and 50.04 (6) (a); and *to create* 20.435 (6) (ge), 50.04 (4) (am), 50.04 (5) (cm), 50.054 and 50.15 of the statutes; **relating** **to:** regulation of nursing homes, ~~informal dispute resolution for long-term care facilities~~, requiring the exercise of rule-making authority, and making an appropriation.

Analysis by the Legislative Reference Bureau

Federal and state requirements for nursing homes

Under current law, a nursing home that receives Medicaid or Medicare funding for the care of a resident is subject to both federal and state requirements. The Department of Health and Family Services (DHFS) enforces both federal and state requirements for nursing homes. Currently, DHFS may ~~impose~~ impose both federal

BILL*that is a Medical Assistance provider**for the same deficiency*

sanctions that are required under Medicaid and state sanctions on a nursing home ~~for the same deficiency~~. This bill prohibits the state from finding that a deficiency at a nursing home is a violation of a state requirement if the deficiency also constitutes a violation of a federal requirement.

Appeals

Currently, in order to appeal a DHFS finding that the nursing home violated a state requirement, a nursing home must request a hearing on the finding within ten days of receiving notice of the violation. If DHFS assesses a forfeiture for the violation and the nursing home wishes to appeal the forfeiture, the nursing home must request a separate hearing on the forfeiture within ten days of receiving notice of the forfeiture assessment. Upon request of the nursing home, the hearing on the finding of violation may be stayed until DHFS assesses a forfeiture so that the hearing on the finding of violation and the hearing on the forfeiture may be consolidated.

The bill extends the deadline for a nursing home to request a hearing on a finding that the nursing home violated a state requirement to 60 days after receipt of the notice of violation or 60 days after notice of assessment of a forfeiture for the violation. The bill also extends the deadline for requesting a hearing on a forfeiture to 60 days after receipt of notice of the forfeiture. The bill further provides that, if a nursing home timely appeals both a finding of violation and a forfeiture, the hearings on the violation and the forfeiture will be consolidated.

Informal dispute resolution

Federal law requires that the state offer nursing homes an informal opportunity to dispute DHFS findings of federal law violations. The bill requires that, if a nursing home requests informal dispute resolution, DHFS commence a hearing before an arbiter within 20 days of receiving the request unless the nursing home and DHFS agree to a later date. The arbiter must make a determination regarding the accuracy of the DHFS finding within ten days of the hearing. If the arbiter determines that the DHFS finding is inaccurate and DHFS agrees with the arbiter's determination, DHFS must vacate or modify its finding and correct any report that cites the finding. The bill requires DHFS to promulgate rules establishing qualifications for arbiters. An employee of DHFS who licenses or inspects nursing homes, community-based residential facilities (C-BRFs), or residential care apartment complexes (RCACs), or a supervisor of such a person, may not serve as an arbiter. The bill also requires DHFS to make the informal dispute resolution process available to nursing homes to challenge findings of both federal and state law violations, and to C-BRFs and RCACs to challenge findings of violations.

Monetary penalties

Under current law, DHFS may assess a forfeiture against a nursing home for a violation of a state requirement. The maximum amount of the forfeiture varies according to the classification of the violation and ranges from \$500 to \$10,000. There is no time limit for DHFS to assess a forfeiture for a violation. Forfeitures collected for violations of state requirements are deposited in the school fund.

BILL

The bill reduces the maximum forfeiture amounts permitted for violations of state requirements and requires that DHFS impose a penalty assessment on a nursing home whenever DHFS assesses a forfeiture for a violation of a state requirement. The bill further requires DHFS to impose a forfeiture and penalty assessment within 90 days of notifying a nursing home of a violation or lose the authority to impose a forfeiture and penalty assessment. The bill also requires DHFS to establish, by rule, the criteria that DHFS must consider in determining whether to impose a forfeiture and penalty assessment and must consider in fixing the amounts of the forfeiture and penalty assessments within the permitted ranges. The bill allocates moneys collected from the penalty assessment for nursing home quality-of-care improvement grants. Finally, the bill permits DHFS to enter into an agreement with a nursing home for the nursing home to spend a specified amount on quality improvement projects for the nursing home instead of paying a forfeiture and penalty assessment.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 20.435 (6) (ge) of the statutes is created to read:

2 20.435 (6) (ge) *Nursing home improvement grants.* All moneys received from
3 penalty assessments imposed by the department under s. 50.04 (5), for nursing home
4 improvement grants under s. 50.15.

5 **SECTION 2.** 49.498 (20) of the statutes is repealed.

6 **SECTION 3.** 50.04 (4) (am) of the statutes is created to read:

7 50.04 (4) (am) *Dual federal and state violations.* If an act or omission
8 constitutes a violation of both this ~~section~~ and s. 49.498 or 42 USC 1395i-3 (b), (c),
9 or (d) or 1396r (b), (c), or (d), the department may not make a determination that the
10 act or omission is a violation of this ~~section~~.

11 **SECTION 4.** 50.04 (4) (b) 4. of the statutes is amended to read:

12 50.04 (4) (b) 4. Each day of violation constitutes a separate violation. Except
13 as provided in sub. (5) (a) 4., the department shall have the burden of showing that

Subchapter or the rules
promulgated under this
Subchapter

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1 a violation existed on each day for which a forfeiture and penalty assessment is
2 assessed imposed. No forfeiture or penalty assessment may be assessed imposed for
3 a condition for which the nursing home has received a variance or waiver of a
4 standard.

5 **SECTION 5.** 50.04 (4) (e) 1. of the statutes is amended to read:

6 50.04 (4) (e) 1. If a nursing home desires to contest any department action
7 under this subsection, it shall send a written request for a hearing under s. 227.44
8 to the division of hearings and appeals created under s. 15.103 (1) within ~~10~~ 60 days
9 of receipt of notice of the contested action or within 60 days of receipt of notice of a
10 forfeiture and penalty assessment imposed under sub. (5) (c) in connection with the
11 contested action. Department action that is subject to a hearing under this
12 subsection includes service of a notice of a violation of this subchapter or rules
13 promulgated under this subchapter, a notation in the report under sub. (3) (b),
14 imposition of a plan of correction, and rejection of a nursing home's plan of correction,
15 but does not include a correction order.

16 ~~Upon the request of the nursing home, the~~
17 ~~division shall grant a stay of the hearing under this paragraph until the department~~
18 ~~assesses a forfeiture, so that its hearing under this paragraph is consolidated with~~
19 ~~the forfeiture appeal hearing held under sub. (5) (e).~~ All agency action under this

20 subsection arising out of a violation, deficiency, or rejection and imposition of a plan
21 of correction shall be the subject of a single hearing. ~~Unless a stay is granted under~~

22 ~~this paragraph, the~~ ~~the~~ division shall commence the hearing within 30 days of the
23 request for hearing, within 30 days of the department's acceptance of a nursing
24 home's plan of correction, or within 30 days of the department's imposition of a plan
25 of correction, whichever is later. The division shall send notice to the nursing home
in conformance with s. 227.44. Issues litigated at the hearing may not be relitigated

RESTORE
TO
PLAIN
TEXT

BILL

1 at subsequent hearings under this paragraph arising out of the same violation or
2 deficiency.

3 **SECTION 6.** 50.04 (5) (title) of the statutes is amended to read:

4 50.04 (5) (title) FORFEITURES AND PENALTY ASSESSMENTS.

5 **SECTION 7.** 50.04 (5) (a) (intro.) of the statutes is amended to read:

6 50.04 (5) (a) *Amounts.* (intro.) Any operator or owner of a nursing home which
7 that is in violation of this subchapter or any rule promulgated thereunder may be
8 subject to the forfeitures specified in this section. If the department imposes a
9 forfeiture under this subsection, the department shall also impose a penalty
10 assessment under this subsection.

11 **SECTION 8.** 50.04 (5) (a) 1., 2. and 3. (intro.) of the statutes are amended to read:

12 50.04 (5) (a) 1. A class "A" violation may be subject to a forfeiture of not more
13 than \$250 and a penalty assessment of not ~~less than \$5,100 nor~~ more than \$10,000
14 for each violation.

15 2. A class "B" violation may be subject to a forfeiture of not more than \$125 and
16 a penalty assessment of not ~~less than \$600 nor~~ more than \$5,000 for each violation.

17 3. (intro.) A class "C" violation may be subject to a forfeiture of not more than
18 \$60 and a penalty assessment of not ~~less than \$100 nor~~ more than \$500. No forfeiture
19 or penalty assessment may be assessed imposed for a class "C" violation unless at
20 least one of the following applies:

21 **SECTION 9.** 50.04 (5) (a) 4. of the statutes is amended to read:

22 50.04 (5) (a) 4. Notwithstanding subds. 1., 2. and 3., if the violation or group
23 of violations results from inadequate staffing, the combined amount of the forfeiture
24 and penalty assessment that the department may ~~assess~~ impose shall be no less than
25 the difference between the cost of the staff actually employed and the estimated cost

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1 of the staff required. The number of staff required shall be determined by the
2 provider contract, the court order, or the department, by rule, whichever is greatest.
3 The inadequate staff shall be presumed to exist from the date of the notice of
4 violation.

5 **SECTION 10.** 50.04 (5) (a) 5. a., b. and d. of the statutes are amended to read:

6 50.04 (5) (a) 5. a. A nursing home that violates a statute or rule resulting in a
7 class “A” violation and that has received a notice of violation for a class “A” “A”
8 violation within the previous 3-year period involving the same situation shall be
9 subject to a forfeiture 3 times the forfeiture amount authorized for a class “A”
10 violation and a penalty assessment 3 times the penalty assessment amount
11 authorized for a class “A” violation.

12 b. Except as provided in subd. 5. a., a nursing home that violates a statute or
13 rule resulting in a class “A” or class “B” violation and that has received a notice of a
14 class “A” or class “B” violation of the same statute or rule within the previous 3-year
15 period may be subject to a forfeiture 3 times the forfeiture amount authorized for the
16 most recent class of violation involved and a penalty assessment 3 times the penalty
17 assessment amount authorized for the most recent class of violation involved.

18 d. The forfeiture ~~amount~~ and penalty assessment amounts that is are tripled
19 under this subdivision shall be the ~~amount-assessed~~ forfeiture and penalty
20 assessment amounts imposed after all appeals have been exhausted. If an
21 assessment imposition of a forfeiture and penalty assessment is not contested and
22 the forfeiture is and penalty assessment are paid as provided in par. (fm), the
23 ~~forfeiture amount~~ and penalty assessment amounts that is are tripled is are the
24 ~~amount assessed~~ amounts imposed after the reduction specified in par. (fm).

25 **SECTION 11.** 50.04 (5) (a) 5m. of the statutes is amended to read:

BILL

① 50.04 (5) (a) 5m. ~~Beginning on December 8, 1987, the~~ department may consider,
2 for purposes of applying triple forfeitures and penalty assessments under subd. 5.,

③ any notice of violation issued by the department ~~within the 2-year period preceding~~ ✓

④ ~~December 8, 1987, or issued by the department on or after December 8, 1987.~~ ✓

after
December
7, 1985 ✓

5 SECTION 12. 50.04 (5) (a) 6. of the statutes is renumbered 50.04 (5) (a) 6. (intro.)
6 and amended to read:

7 50.04 (5) (a) 6. (intro.) If a licensee fails to correct a violation within the time
8 specified in the notice of violation or approved plan of correction, or within the
9 extended correction time granted under sub. (4) (c) 4., or if a violation continues after
10 a report of correction, the department may assess upon the licensee ~~a~~ for each day
11 of the continuing violation whichever of the following is applicable:

12 a. A separate forfeiture of not more than \$10,000 \$250 and a separate penalty
13 assessment of not more than \$10,000 for a class "A" violations, and may assess a
14 violation.

15 b. A separate forfeiture of not more than \$5,000 \$125 and a separate penalty
16 assessment of not more than \$5,000 for a class "B" violations, for each day of
17 continuing violation.

RESTORE TO PLAIN TEXT

18 SECTION 13. 50.04 (5) (b) (intro.) of the statutes is amended to read:

19 50.04 (5) (b) *Factors in assessment imposition of forfeitures and penalty*
20 *assessments.* (intro.) In The department shall promulgate rules establishing all of

21 the factors that the department shall consider in determining whether to impose a
22 forfeiture is to be imposed and penalty assessment for a violation and in fixing the
23 amount amounts of the forfeiture to be imposed and penalty assessment, if any, for
24 a violation, the including the following factors shall be considered:

25 SECTION 14. 50.04 (5) (c) of the statutes is amended to read:

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PLAIN TEXT

BILL

1 50.04 (5) (c) *Assessment Imposition of forfeitures and penalty assessments;*
2 *powers and duties of department.* The department may directly assess impose
3 forfeitures and penalty assessments provided for under par. (a). If the department
4 determines that a forfeiture and penalty assessment should be assessed imposed for
5 a particular violation or for failure to correct it, ~~it~~ the department shall send a notice
6 of assessment imposition of forfeiture and penalty assessment to the nursing home.
7 The notice shall specify the ~~amount~~ amounts of the forfeiture assessed and penalty
8 assessment imposed, the violation, and the statute or rule alleged to have been
9 violated, and shall inform the licensee of the right to hearing under par. (e). If the
10 department does not issue a notice of forfeiture and penalty assessment within 90
11 days of a violation, it may not impose a forfeiture or penalty assessment for the
12 violation.

13 **SECTION 15.** 50.04 (5) (cm) of the statutes is created to read:

14 50.04 (5) (cm) *Quality-of-care improvement agreements.* If, after the
15 department imposes a forfeiture and penalty assessment under par. (c), the
16 department and a nursing home agree that instead of paying the forfeiture and
17 penalty assessment the nursing home shall spend a specified amount on specified
18 measures to improve the quality of care for nursing home residents, the department
19 shall vacate the forfeiture and penalty assessment imposed under par. (c). The
20 department may extend the time for paying a forfeiture and penalty assessment
21 under par. (f) to negotiate an agreement under this paragraph.

22 **SECTION 16.** 50.04 (5) (d) (title) of the statutes is amended to read:

23 50.04 (5) (d) (title) *Forfeiture and penalty assessment period.*

24 **SECTION 17.** 50.04 (5) (d) 1. of the statutes is amended to read:

BILL

1 50.04 (5) (d) 1. In the case of a class “B” violation, no forfeiture or penalty
2 assessment may be assessed imposed for the violation from the day following the
3 date of discovery until the date of notification. If the department fails to approve or
4 reject a plan of correction within 15 days after its receipt of a complete plan, no
5 forfeiture or penalty assessment may be imposed for the period beginning with the
6 15th day after receipt and ending when notice of approval or rejection is received by
7 the home. If a plan of correction is approved and carried out, no forfeiture or penalty
8 assessment may be assessed imposed during the time period specified in the
9 approved plan of correction, commencing on the day the plan of correction is received
10 by the department.

11 **SECTION 18.** 50.04 (5) (d) 2. (intro.) of the statutes is amended to read:

12 50.04 (5) (d) 2. (intro.) In the case of a class “C” violation for which a notice of
13 violation has been served, a forfeiture and penalty assessment may be assessed
14 imposed for whichever of the following periods is applicable:

15 **SECTION 19.** 50.04 (5) (dm) (intro.) of the statutes is amended to read:

16 50.04 (5) (dm) (intro.) *Forfeiture and penalty assessment imposition date.* In
17 the case of a class “B” violation, the department may not assess impose a forfeiture
18 or a penalty assessment upon a nursing home until:

19 **SECTION 20.** 50.04 (5) (e) of the statutes is amended to read:

20 50.04 (5) (e) *Forfeiture and penalty assessment appeal hearing.* A nursing
21 home may contest an assessment imposition of a forfeiture and penalty assessment
22 by sending, within ~~10~~ 60 days after receipt of notice of a contested action, a written
23 request for hearing under s. 227.44 to the division of hearings and appeals created
24 under s. 15.103 (1). The administrator of the division may designate a hearing
25 examiner to preside over the case and recommend a decision to the administrator

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1 under s. 227.46. The decision of the administrator of the division shall be the final
2 administrative decision. The division shall commence the hearing within 30 days of
3 receipt of the request for hearing and shall issue a final decision within 15 days after
4 the close of the hearing. Proceedings before the division are governed by ch. 227. In
5 any petition for judicial review of a decision by the division, the party, other than the
6 petitioner, who was in the proceeding before the division shall be the named
7 respondent. If, after receipt of notice of imposition of a forfeiture and penalty
8 assessment, a nursing home timely requests a hearing under sub. (4) (e) on the
9 contested action under sub. (4) for which the forfeiture and penalty assessment were
10 imposed, and requests a hearing under this paragraph on the imposition of the
11 forfeiture and penalty assessment, the hearing on the contested action under sub.
12 (4) and the hearing on the imposition of the forfeiture and penalty assessment shall
13 be consolidated.

14 SECTION 21. 50.04 (5) (f) of the statutes is amended to read:

as affected by 2003 Wisconsin Act 33,

15 50.04 (5) (f) Forfeitures and penalty assessments paid within 10 days. All
16 forfeitures and penalty assessments shall be paid to the department within 10 days
17 of receipt of notice of assessment imposition of the forfeiture and penalty assessment
18 or, if the forfeiture or penalty assessment is contested under par. (e), within 10 days
19 of receipt of the final decision after exhaustion of administrative review, unless the
20 final decision is appealed and the order is stayed by court order under s. 50.03 (11).
21 The department shall remit all forfeitures paid to the *secretary of administration*
22 the school fund. All moneys collected as penalty assessments under this subsection
23 shall be credited to the appropriation account under s. 20.435 (6) (ge).

24 SECTION 22. 50.04 (5) (fm) of the statutes is amended to read:

BILL

1 50.04 (5) (fm) *Forfeiture and penalty assessment reduction for timely payment.*

2 If a nursing home does not contest a notice of violation under sub. (4) (e) and does not
3 contest an ~~assessment~~ imposition of a forfeiture and penalty assessment under par.
4 (e) for a class “A” or class “B” violation and pays the forfeiture and penalty
5 assessment to the department within 10 days after receipt of the notice of ~~assessment~~
6 imposition of the forfeiture and penalty assessment, the department shall reduce the
7 amount of the ~~assessment~~ forfeiture and penalty assessment by 35%.

8 **SECTION 23.** 50.04 (5) (fr) of the statutes is amended to read:

9 50.04 (5) (fr) *Report to the legislature.* Annually, the department shall submit
10 a report to the legislature under s. 13.172 (2) that specifies for the previous year the
11 number of class “A” violations, the ~~amount~~ amounts of the forfeiture ~~assessment and~~
12 penalty assessment imposed for each of those violations and, if known, the ~~amount~~
13 amounts of the forfeiture and penalty assessment actually paid and collected with
14 respect to those violations. The report shall also include an explanation for any
15 ~~assessment that was~~ imposition of a forfeiture and penalty assessment that totaled
16 less than \$2,500 for the violations specified in the report.

17 **SECTION 24.** 50.04 (5) (g) of the statutes is amended to read:

18 50.04 (5) (g) *Enforcement by attorney general.* The attorney general may bring
19 an action in the name of the state to collect any forfeiture or penalty assessment
20 imposed under this section if the forfeiture or penalty assessment has not been paid
21 following the exhaustion of all administrative and judicial reviews. The only issue
22 to be contested in any such action shall be whether the forfeiture or penalty
23 assessment has been paid.

24 **SECTION 25.** 50.04 (6) (a) of the statutes is amended to read:

BILL

1 50.04 (6) (a) *Power of department.* In addition to the right to assess impose
2 forfeitures and penalty assessments under sub. (5), the department may issue a
3 conditional license to any nursing home if the department finds that either a class
4 “A” or a class “B” violation, as defined in sub. (4), continues to exist in such home.
5 The issuance of a conditional license shall revoke any outstanding license held by the
6 nursing home. The nursing home may seek review of a decision to issue a conditional
7 license as provided under s. 50.03 (5).

8 **SECTION 26.** 50.054 of the statutes is created to read:

9 **50.054 Informal dispute resolution.** The department shall offer nursing
10 homes, community-based residential facilities, and residential care apartment
11 complexes an informal opportunity to dispute any finding of a violation issued under
12 s. 49.498 (16), 50.034 (8), 50.035 (11), or 50.04 (4). If a nursing home,
13 community-based residential facility, or residential care apartment complex
14 requests informal dispute resolution under this section, the department shall
15 commence a hearing before an arbiter within 20 days after receiving the request for
16 informal dispute resolution unless the department and the requester agree to a later
17 date. The arbiter may not be a person who is employed by the department as a
18 licensor or inspector of nursing homes, community-based residential facilities, or
19 residential care apartment complexes and may not be a direct or indirect supervisor
20 of such licensors or inspectors. The arbiter shall make a determination within 10
21 days after the close of the hearing. If the arbiter determines that the department’s
22 finding of a violation was inaccurate and the department agrees with the
23 determination, the department shall reverse or modify the finding of violation and
24 correct any report that cites the violation. Nothing under this section affects the
25 right to appeal an action of the department under s. 49.498, 50.034 (8) (c), 50.035 (11)

BILL

1 (c), or 50.04 (4) (e). The department shall promulgate rules establishing the
2 qualifications of arbiters under this section.

3 **SECTION 27.** 50.15 of the statutes is created to read:

4 **50.15 Nursing home improvement grants.** From the appropriation
5 account under s. 20.435 (6) (ge), the department shall make grants to nursing homes
6 to fund quality-of-care improvement projects. INSERT 13-6 ✓

7 **SECTION 28. Initial applicability.** → INS. 13-11 ←

8 (1) **HEARING REQUESTS.** The treatment of section 50.04 (4) (e) 1. and (5) (e) of the
9 statutes first applies to requests for hearings related to a notice of violation, a report
10 notation, a plan correction, or a rejection of a plan correction that is issued on the
11 effective date of this subsection.

12 (END)

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**2003-2004 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

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INSERT 13-6 ✓

1 **(No 9)** The department shall promulgate rules that specify the eligibility criteria and
2 application procedures for receipt of a grant under this section.

INSERT 13-11 ✓

3 **SECTION 1. Nonstatutory provisions.**

4 (1) NURSING HOME IMPROVEMENT GRANTS. The department of health and family
5 services shall submit in proposed form the rules required under section 50.15 ✓ of the
6 statutes, as created by this act, to the legislative council staff under section 227.15
7 (1) ✓ of the statutes no later than the first day of the 7th month beginning after the
8 effective date of this subsection.

Kennedy, Debora

From: Liedl, Kimberly
Sent: Wednesday, September 17, 2003 3:31 PM
To: Kennedy, Debora
Subject: LRB 2032/2

Hi, Deb, I was told that you're the one working on Mark's nursing home bill now that Robin is gone. I think that you've been working with Brian Purtell in drafting this, right? Anyway, Mark and I met with Brian and some other nursing home people to discuss this bill yesterday. The draft looks good, though Brian was hoping to change the wording a little bit at the end of the first paragraph on the front page, and replace the last sentence on that page with the following. Would this change (or something close to it) work?

"Currently, for nursing home participants in the Medicare and/or Medical Assistance programs, DHFS may not impose both federal and state sanctions for the same deficiency."

Brian's reasoning behind it is to clarify it and to make it more accurately reflect the law. Specifically, he feels that the current language doesn't capture the application of the law for Medicare-only facilities.

Feel free to contact our office with any questions. Thanks,
Kimber



(SOON - In edit 9/19)

State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-2032/23
DAK&RLR:kmg:pe

2003 BILL

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Federal and state requirements for nursing homes

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not

and
State

BILL

prohibits the state from finding that a deficiency at a nursing home that is a Medical Assistance provider is a violation of a state requirement if the deficiency also constitutes a violation of a federal requirement.

Appeals

Currently, in order to appeal a DHFS finding that the nursing home violated a state requirement, a nursing home must request a hearing on the finding within ten days of receiving notice of the violation. If DHFS assesses a forfeiture for the violation and the nursing home wishes to appeal the forfeiture, the nursing home must request a separate hearing on the forfeiture within ten days of receiving notice of the forfeiture assessment. Upon request of the nursing home, the hearing on the finding of violation may be stayed until DHFS assesses a forfeiture so that the hearing on the finding of violation and the hearing on the forfeiture may be consolidated.

The bill extends the deadline for a nursing home to request a hearing on a finding that the nursing home violated a state requirement to 60 days after receipt of the notice of violation or 60 days after notice of assessment of a forfeiture for the violation. The bill also extends the deadline for requesting a hearing on a forfeiture to 60 days after receipt of notice of the forfeiture. The bill further provides that, if a nursing home timely appeals both a finding of violation and a forfeiture, the hearings on the violation and the forfeiture will be consolidated.

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The bill reduces the maximum forfeiture amounts permitted for violations of state requirements and requires that DHFS impose a penalty assessment on a nursing home whenever DHFS assesses a forfeiture for a violation of a state requirement. The bill further requires DHFS to impose a forfeiture and penalty assessment within 90 days of notifying a nursing home of a violation or lose the authority to impose a forfeiture and penalty assessment. The bill allocates moneys collected from the penalty assessments for nursing home quality-of-care improvement grants. Finally, the bill permits DHFS to enter into an agreement with a nursing home for the nursing home to spend a specified amount on quality improvement projects for the nursing home instead of paying a forfeiture and penalty assessment.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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3 improvement grants under s. 50.15.

4 **SECTION 2.** 49.498 (20) of the statutes is repealed.

5 **SECTION 3.** 50.04 (4) (am) of the statutes is created to read:

6 50.04 (4) (am) *Dual federal and state violations*. If an act or omission
7 constitutes a violation of both this subchapter or the rules promulgated under this
8 subchapter and s. 49.498 or 42 USC 1395i-3 (b), (c), or (d) or 1396r (b), (c), or (d), the
9 department may not make a determination that the act or omission is a violation of
10 this subchapter or the rules promulgated under this subchapter.

11 **SECTION 4.** 50.04 (4) (b) 4. of the statutes is amended to read:

12 50.04 (4) (b) 4. Each day of violation constitutes a separate violation. Except
13 as provided in sub. (5) (a) 4., the department shall have the burden of showing that
14 a violation existed on each day for which a forfeiture and penalty assessment is
15 assessed imposed. No forfeiture or penalty assessment may be assessed imposed for
16 a condition for which the nursing home has received a variance or waiver of a
17 standard.

18 **SECTION 5.** 50.04 (4) (e) 1. of the statutes is amended to read:

19 50.04 (4) (e) 1. If a nursing home desires to contest any department action
20 under this subsection, it shall send a written request for a hearing under s. 227.44
21 to the division of hearings and appeals created under s. 15.103 (1) within ~~10~~ 60 days
22 of receipt of notice of the contested action or within 60 days of receipt of notice of a
23 forfeiture and penalty assessment imposed under sub. (5) (c) in connection with the
24 contested action. Department action that is subject to a hearing under this
25 subsection includes service of a notice of a violation of this subchapter or rules

BILL**SECTION 5**

1 promulgated under this subchapter, a notation in the report under sub. (3) (b),
2 imposition of a plan of correction, and rejection of a nursing home's plan of correction,
3 but does not include a correction order. Upon the request of the nursing home, the
4 division shall grant a stay of the hearing under this paragraph until the department
5 assesses a forfeiture, so that its hearing under this paragraph is consolidated with
6 the forfeiture appeal hearing held under sub. (5) (e). All agency action under this
7 subsection arising out of a violation, deficiency, or rejection and imposition of a plan
8 of correction shall be the subject of a single hearing. Unless a stay is granted under
9 this paragraph, the division shall commence the hearing within 30 days of the
10 request for hearing, within 30 days of the department's acceptance of a nursing
11 home's plan of correction, or within 30 days of the department's imposition of a plan
12 of correction, whichever is later. The division shall send notice to the nursing home
13 in conformance with s. 227.44. Issues litigated at the hearing may not be relitigated
14 at subsequent hearings under this paragraph arising out of the same violation or
15 deficiency.

16 **SECTION 6.** 50.04 (5) (title) of the statutes is amended to read:

17 50.04 (5) (title) **FORFEITURES AND PENALTY ASSESSMENTS**.

18 **SECTION 7.** 50.04 (5) (a) (intro.) of the statutes is amended to read:

19 50.04 (5) (a) *Amounts.* (intro.) Any operator or owner of a nursing home which
20 that is in violation of this subchapter or any rule promulgated thereunder under this
21 subchapter may be subject to the forfeitures specified in this section. If the
22 department imposes a forfeiture under this subsection, the department shall also
23 impose a penalty assessment under this subsection.

24 **SECTION 8.** 50.04 (5) (a) 1., 2. and 3. (intro.) of the statutes are amended to read:

BILL

1 50.04 (5) (a) 1. A class “A” violation may be subject to a forfeiture of not more
2 than \$250 and a penalty assessment of not more than \$10,000 for each violation.

3 2. A class “B” violation may be subject to a forfeiture of not more than \$125 and
4 a penalty assessment of not more than \$5,000 for each violation.

5 3. (intro.) A class “C” violation may be subject to a forfeiture of not more than
6 \$60 and a penalty assessment of not more than \$500. No forfeiture or penalty
7 assessment may be assessed imposed for a class “C” violation unless at least one of
8 the following applies:

9 **SECTION 9.** 50.04 (5) (a) 4. of the statutes is amended to read:

10 50.04 (5) (a) 4. Notwithstanding subds. 1., 2. and 3., if the violation or group
11 of violations results from inadequate staffing, the combined amount of the forfeiture
12 and penalty assessment that the department may assess impose shall be no less than
13 the difference between the cost of the staff actually employed and the estimated cost
14 of the staff required. The number of staff required shall be determined by the
15 provider contract, the court order, or the department, by rule, whichever is greatest.
16 The inadequate staff shall be presumed to exist from the date of the notice of
17 violation.

18 **SECTION 10.** 50.04 (5) (a) 5. a., b. and d. of the statutes are amended to read:

19 50.04 (5) (a) 5. a. A nursing home that violates a statute or rule resulting in a
20 class “A” violation and that has received a notice of violation for a class ”A” “A”
21 violation within the previous 3–year period involving the same situation shall be
22 subject to a forfeiture 3 times the forfeiture amount authorized for a class “A”
23 violation and a penalty assessment 3 times the penalty assessment amount
24 authorized for a class “A” violation.

BILL**SECTION 10**

1 b. Except as provided in subd. 5. a., a nursing home that violates a statute or
2 rule resulting in a class "A" or class "B" violation and that has received a notice of a
3 class "A" or class "B" violation of the same statute or rule within the previous 3-year
4 period may be subject to a forfeiture 3 times the forfeiture amount authorized for the
5 most recent class of violation involved and a penalty assessment 3 times the penalty
6 assessment amount authorized for the most recent class of violation involved.

7 d. The forfeiture amount and penalty assessment amounts that is are tripled
8 under this subdivision shall be the amount assessed forfeiture and penalty
9 assessment amounts imposed after all appeals have been exhausted. If an
10 assessment imposition of a forfeiture and penalty assessment is not contested and
11 the forfeiture is and penalty assessment are paid as provided in par. (fm), the
12 forfeiture amount and penalty assessment amounts that is are tripled is are the
13 amount assessed amounts imposed after the reduction specified in par. (fm).

14 **SECTION 11.** 50.04 (5) (a) 5m. of the statutes is amended to read:

15 50.04 (5) (a) 5m. ~~Beginning on December 8, 1987, the~~ The department may
16 consider, for purposes of applying triple forfeitures and penalty assessments under
17 subd. 5., any notice of violation issued by the department ~~within the 2-year period~~
18 ~~preceding December 8, 1987, or issued by the department on or after December 8,~~
19 ~~1987~~ after December 7, 1985.

20 **SECTION 12.** 50.04 (5) (a) 6. of the statutes is renumbered 50.04 (5) (a) 6. (intro.)
21 and amended to read:

22 50.04 (5) (a) 6. (intro.) If a licensee fails to correct a violation within the time
23 specified in the notice of violation or approved plan of correction, or within the
24 extended correction time granted under sub. (4) (c) 4., or if a violation continues after

BILL

1 a report of correction, the department may assess upon the licensee ~~a~~ for each day
2 of the continuing violation whichever of the following is applicable:

3 a. A separate forfeiture of not more than \$10,000 \$250 and a separate penalty
4 assessment of not more than \$10,000 for a class "A" violations, and may assess a
5 violation.

6 b. A separate forfeiture of not more than \$5,000 \$125 and a separate penalty
7 assessment of not more than \$5,000 for a class "B" violations, for each day of
8 continuing violation.

9 SECTION 13. 50.04 (5) (b) (intro.) of the statutes is amended to read:

10 50.04 (5) (b) *Factors in assessment imposition of forfeitures and penalty*
11 *assessments.* (intro.) In determining whether to impose a forfeiture is to be imposed
12 and penalty assessment for a violation and in fixing the amount amounts of the
13 forfeiture to be imposed and penalty assessment, if any, for a violation, the following
14 factors shall be considered:

15 SECTION 14. 50.04 (5) (c) of the statutes is amended to read:

16 50.04 (5) (c) *Assessment Imposition of forfeitures and penalty assessments;*
17 *powers and duties of department.* The department may directly assess impose
18 forfeitures and penalty assessments provided for under par. (a). If the department
19 determines that a forfeiture and penalty assessment should be assessed imposed for
20 a particular violation or for failure to correct it, it the department shall send a notice
21 of assessment imposition of forfeiture and penalty assessment to the nursing home.
22 The notice shall specify the amount amounts of the forfeiture assessed and penalty
23 assessment imposed, the violation, and the statute or rule alleged to have been
24 violated, and shall inform the licensee of the right to hearing under par. (e). If the
25 department does not issue a notice of forfeiture and penalty assessment within 90

BILL**SECTION 14**

1 days of a violation, it may not impose a forfeiture or penalty assessment for the
2 violation.

3 **SECTION 15.** 50.04 (5) (cm) of the statutes is created to read:

4 50.04 (5) (cm) *Quality-of-care improvement agreements.* If, after the
5 department imposes a forfeiture and penalty assessment under par. (c), the
6 department and a nursing home agree that instead of paying the forfeiture and
7 penalty assessment the nursing home shall spend a specified amount on specified
8 measures to improve the quality of care for nursing home residents, the department
9 shall vacate the forfeiture and penalty assessment imposed under par. (c). The
10 department may extend the time for paying a forfeiture and penalty assessment
11 under par. (f) to negotiate an agreement under this paragraph.

12 **SECTION 16.** 50.04 (5) (d) (title) of the statutes is amended to read:

13 50.04 (5) (d) (title) *Forfeiture and penalty assessment period.*

14 **SECTION 17.** 50.04 (5) (d) 1. of the statutes is amended to read:

15 50.04 (5) (d) 1. In the case of a class “B” violation, no forfeiture or penalty
16 assessment may be assessed imposed for the violation from the day following the
17 date of discovery until the date of notification. If the department fails to approve or
18 reject a plan of correction within 15 days after its receipt of a complete plan, no
19 forfeiture or penalty assessment may be imposed for the period beginning with the
20 15th day after receipt and ending when notice of approval or rejection is received by
21 the home. If a plan of correction is approved and carried out, no forfeiture or penalty
22 assessment may be assessed imposed during the time period specified in the
23 approved plan of correction, commencing on the day the plan of correction is received
24 by the department.

25 **SECTION 18.** 50.04 (5) (d) 2. (intro.) of the statutes is amended to read:

BILL

1 50.04 (5) (d) 2. (intro.) In the case of a class “C” violation for which a notice of
2 violation has been served, a forfeiture and penalty assessment may be assessed
3 imposed for whichever of the following periods is applicable:

4 **SECTION 19.** 50.04 (5) (dm) (intro.) of the statutes is amended to read:

5 50.04 (5) (dm) (intro.) *Forfeiture and penalty assessment imposition date.* In
6 the case of a class “B” violation, the department may not assess impose a forfeiture
7 or a penalty assessment upon a nursing home until:

8 **SECTION 20.** 50.04 (5) (e) of the statutes is amended to read:

9 50.04 (5) (e) *Forfeiture and penalty assessment appeal hearing.* A nursing
10 home may contest an assessment imposition of a forfeiture and penalty assessment
11 by sending, within ~~10~~ 60 days after receipt of notice of a contested action, a written
12 request for hearing under s. 227.44 to the division of hearings and appeals created
13 under s. 15.103 (1). The administrator of the division may designate a hearing
14 examiner to preside over the case and recommend a decision to the administrator
15 under s. 227.46. The decision of the administrator of the division shall be the final
16 administrative decision. The division shall commence the hearing within 30 days of
17 receipt of the request for hearing and shall issue a final decision within 15 days after
18 the close of the hearing. Proceedings before the division are governed by ch. 227. In
19 any petition for judicial review of a decision by the division, the party, other than the
20 petitioner, who was in the proceeding before the division shall be the named
21 respondent. If, after receipt of notice of imposition of a forfeiture and penalty
22 assessment, a nursing home timely requests a hearing under sub. (4) (e) on the
23 contested action under sub. (4) for which the forfeiture and penalty assessment were
24 imposed, and requests a hearing under this paragraph on the imposition of the
25 forfeiture and penalty assessment, the hearing on the contested action under sub.

BILL

1 (4) and the hearing on the imposition of the forfeiture and penalty assessment shall
2 be consolidated.

3 **SECTION 21.** 50.04 (5) (f) of the statutes, as affected by 2003 Wisconsin Act 33,
4 is amended to read:

5 50.04 (5) (f) *Forfeitures and penalty assessments paid within 10 days.* All
6 forfeitures and penalty assessments shall be paid to the department within 10 days
7 of receipt of notice of assessment imposition of the forfeiture and penalty assessment
8 or, if the forfeiture or penalty assessment is contested under par. (e), within 10 days
9 of receipt of the final decision after exhaustion of administrative review, unless the
10 final decision is appealed and the order is stayed by court order under s. 50.03 (11).
11 The department shall remit all forfeitures paid to the secretary of administration for
12 deposit in the school fund. All moneys collected as penalty assessments under this
13 subsection shall be credited to the appropriation account under s. 20.435 (6) (ge).

14 **SECTION 22.** 50.04 (5) (fm) of the statutes is amended to read:

15 50.04 (5) (fm) *Forfeiture and penalty assessment reduction for timely payment.*
16 If a nursing home does not contest a notice of violation under sub. (4) (e) and does not
17 contest an assessment imposition of a forfeiture and penalty assessment under par.
18 (e) for a class “A” or class “B” violation and pays the forfeiture and penalty
19 assessment to the department within 10 days after receipt of the notice of assessment
20 imposition of the forfeiture and penalty assessment, the department shall reduce the
21 amount of the assessment forfeiture and penalty assessment by 35%.

22 **SECTION 23.** 50.04 (5) (fr) of the statutes is amended to read:

23 50.04 (5) (fr) *Report to the legislature.* Annually, the department shall submit
24 a report to the legislature under s. 13.172 (2) that specifies for the previous year the
25 number of class “A” violations, the ~~amount~~ amounts of the forfeiture assessment and

BILL

1 penalty assessment imposed for each of those violations and, if known, the amount
2 amounts of the forfeiture and penalty assessment actually paid and collected with
3 respect to those violations. The report shall also include an explanation for any
4 ~~assessment that was~~ imposition of a forfeiture and penalty assessment that totaled
5 less than \$2,500 for the violations specified in the report.

6 **SECTION 24.** 50.04 (5) (g) of the statutes is amended to read:

7 50.04 (5) (g) *Enforcement by attorney general.* The attorney general may bring
8 an action in the name of the state to collect any forfeiture or penalty assessment
9 imposed under this section if the forfeiture or penalty assessment has not been paid
10 following the exhaustion of all administrative and judicial reviews. The only issue
11 to be contested in any such action shall be whether the forfeiture or penalty
12 assessment has been paid.

13 **SECTION 25.** 50.04 (6) (a) of the statutes is amended to read:

14 50.04 (6) (a) *Power of department.* In addition to the right to assess impose
15 forfeitures and penalty assessments under sub. (5), the department may issue a
16 conditional license to any nursing home if the department finds that either a class
17 “A” or a class “B” violation, as defined in sub. (4), continues to exist in such home.
18 The issuance of a conditional license shall revoke any outstanding license held by the
19 nursing home. The nursing home may seek review of a decision to issue a conditional
20 license as provided under s. 50.03 (5).

21 **SECTION 26.** 50.15 of the statutes is created to read:

22 **50.15 Nursing home improvement grants.** From the appropriation
23 account under s. 20.435 (6) (ge), the department shall make grants to nursing homes
24 to fund quality-of-care improvement projects. The department shall promulgate

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1 rules that specify the eligibility criteria and application procedures for receipt of a
2 grant under this section.

3 **SECTION 27. Nonstatutory provisions.**

4 (1) NURSING HOME IMPROVEMENT GRANTS. The department of health and family
5 services shall submit in proposed form the rules required under section 50.15 of the
6 statutes, as created by this act, to the legislative council staff under section 227.15
7 (1) of the statutes no later than the first day of the 7th month beginning after the
8 effective date of this subsection.

9 **SECTION 28. Initial applicability.**

10 (1) HEARING REQUESTS. The treatment of section 50.04 (4) (e) 1. and (5) (e) of the
11 statutes first applies to requests for hearings related to a notice of violation, a report
12 notation, a plan correction, or a rejection of a plan correction that is issued on the
13 effective date of this subsection.

14 (END)

TELEPHONE DRAFTING INSTRUCTIONS

Drafting instructions received by Debora Kennedy.

DATE:

9/23

CONVERSATION
WITH:

Kimberly -

OF:

Pettis' office

TELEPHONE NO:

REGARDING LRB #
OR DRAFT TOPIC:

20 32/3

INSTRUCTIONS:

Redraft

Her instructions on the 1/3 redraft were incorrect, as to the analysis + fed + st. sanctions

From Brian Purcell = It is for who that are MA and Medicaid providers that DHFS currently can impose fed (CFR) + state sanctions — DHFS doesn't use 49.498 (based on + regd. by Federal law)



SOON - In edit 9/23
State of Wisconsin
2003 - 2004 LEGISLATURE

LRB-2032/8 4
DAK&RLR:kmg: [initials]

2003 BILL

1 AN ACT *to repeal* 49.498 (20); *to renumber and amend* 50.04 (5) (a) 6.; *to*
2 *amend* 50.04 (4) (b) 4., 50.04 (4) (e) 1., 50.04 (5) (title), 50.04 (5) (a) (intro.), 50.04
3 (5) (a) 1., 2. and 3. (intro.), 50.04 (5) (a) 4., 50.04 (5) (a) 5. a., b. and d., 50.04 (5)
4 (a) 5m., 50.04 (5) (b) (intro.), 50.04 (5) (c), 50.04 (5) (d) (title), 50.04 (5) (d) 1.,
5 50.04 (5) (d) 2. (intro.), 50.04 (5) (dm) (intro.), 50.04 (5) (e), 50.04 (5) (f), 50.04
6 (5) (fm), 50.04 (5) (fr), 50.04 (5) (g) and 50.04 (6) (a); and *to create* 20.435 (6)
7 (ge), 50.04 (4) (am), 50.04 (5) (cm) and 50.15 of the statutes; **relating to:**
8 regulation of nursing homes, requiring the exercise of rule-making authority,
9 and making an appropriation.

Analysis by the Legislative Reference Bureau

Federal and state requirements for nursing homes

Under current law, a nursing home that receives Medicaid or Medicare funding for the care of a resident is subject to both federal and state requirements. The Department of Health and Family Services (DHFS) enforces both federal and state requirements for nursing homes. Currently, for nursing homes that are Medicaid ~~or~~ ✓ and Medicare providers, DHFS may ~~not~~ impose both federal and state sanctions for the same deficiency. This bill prohibits the state from finding that a deficiency at a

BILL

nursing home that is a Medical Assistance provider is a violation of a state requirement if the deficiency also constitutes a violation of a federal requirement.

Appeals

Currently, in order to appeal a DHFS finding that the nursing home violated a state requirement, a nursing home must request a hearing on the finding within ten days of receiving notice of the violation. If DHFS assesses a forfeiture for the violation and the nursing home wishes to appeal the forfeiture, the nursing home must request a separate hearing on the forfeiture within ten days of receiving notice of the forfeiture assessment. Upon request of the nursing home, the hearing on the finding of violation may be stayed until DHFS assesses a forfeiture so that the hearing on the finding of violation and the hearing on the forfeiture may be consolidated.

The bill extends the deadline for a nursing home to request a hearing on a finding that the nursing home violated a state requirement to 60 days after receipt of the notice of violation or 60 days after notice of assessment of a forfeiture for the violation. The bill also extends the deadline for requesting a hearing on a forfeiture to 60 days after receipt of notice of the forfeiture. The bill further provides that, if a nursing home timely appeals both a finding of violation and a forfeiture, the hearings on the violation and the forfeiture will be consolidated.

Monetary penalties

Under current law, DHFS may assess a forfeiture against a nursing home for a violation of a state requirement. The maximum amount of the forfeiture varies according to the classification of the violation and ranges from \$500 to \$10,000. There is no time limit for DHFS to assess a forfeiture for a violation. Forfeitures collected for violations of state requirements are deposited in the school fund.

The bill reduces the maximum forfeiture amounts permitted for violations of state requirements and requires that DHFS impose a penalty assessment on a nursing home whenever DHFS assesses a forfeiture for a violation of a state requirement. The bill further requires DHFS to impose a forfeiture and penalty assessment within 90 days of notifying a nursing home of a violation or lose the authority to impose a forfeiture and penalty assessment. The bill allocates moneys collected from the penalty assessments for nursing home quality-of-care improvement grants. Finally, the bill permits DHFS to enter into an agreement with a nursing home for the nursing home to spend a specified amount on quality improvement projects for the nursing home instead of paying a forfeiture and penalty assessment.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 20.435 (6) (ge) of the statutes is created to read:

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1 20.435 (6) (ge) *Nursing home improvement grants*. All moneys received from
2 penalty assessments imposed by the department under s. 50.04 (5), for nursing home
3 improvement grants under s. 50.15.

4 **SECTION 2.** 49.498 (20) of the statutes is repealed.

5 **SECTION 3.** 50.04 (4) (am) of the statutes is created to read:

6 50.04 (4) (am) *Dual federal and state violations*. If an act or omission
7 constitutes a violation of both this subchapter or the rules promulgated under this
8 subchapter and s. 49.498 or 42 USC 1395i-3 (b), (c), or (d) or 1396r (b), (c), or (d), the
9 department may not make a determination that the act or omission is a violation of
10 this subchapter or the rules promulgated under this subchapter.

11 **SECTION 4.** 50.04 (4) (b) 4. of the statutes is amended to read:

12 50.04 (4) (b) 4. Each day of violation constitutes a separate violation. Except
13 as provided in sub. (5) (a) 4., the department shall have the burden of showing that
14 a violation existed on each day for which a forfeiture and penalty assessment is
15 assessed imposed. No forfeiture or penalty assessment may be assessed imposed for
16 a condition for which the nursing home has received a variance or waiver of a
17 standard.

18 **SECTION 5.** 50.04 (4) (e) 1. of the statutes is amended to read:

19 50.04 (4) (e) 1. If a nursing home desires to contest any department action
20 under this subsection, it shall send a written request for a hearing under s. 227.44
21 to the division of hearings and appeals created under s. 15.103 (1) within ~~10~~ 60 days
22 of receipt of notice of the contested action or within 60 days of receipt of notice of a
23 forfeiture and penalty assessment imposed under sub. (5) (c) in connection with the
24 contested action. Department action that is subject to a hearing under this
25 subsection includes service of a notice of a violation of this subchapter or rules

BILL**SECTION 5**

1 promulgated under this subchapter, a notation in the report under sub. (3) (b),
2 imposition of a plan of correction, and rejection of a nursing home's plan of correction,
3 but does not include a correction order. Upon the request of the nursing home, the
4 division shall grant a stay of the hearing under this paragraph until the department
5 assesses a forfeiture, so that its hearing under this paragraph is consolidated with
6 the forfeiture appeal hearing held under sub. (5) (e). All agency action under this
7 subsection arising out of a violation, deficiency, or rejection and imposition of a plan
8 of correction shall be the subject of a single hearing. Unless a stay is granted under
9 this paragraph, the division shall commence the hearing within 30 days of the
10 request for hearing, within 30 days of the department's acceptance of a nursing
11 home's plan of correction, or within 30 days of the department's imposition of a plan
12 of correction, whichever is later. The division shall send notice to the nursing home
13 in conformance with s. 227.44. Issues litigated at the hearing may not be relitigated
14 at subsequent hearings under this paragraph arising out of the same violation or
15 deficiency.

16 **SECTION 6.** 50.04 (5) (title) of the statutes is amended to read:

17 50.04 (5) (title) FORFEITURES AND PENALTY ASSESSMENTS.

18 **SECTION 7.** 50.04 (5) (a) (intro.) of the statutes is amended to read:

19 50.04 (5) (a) *Amounts.* (intro.) Any operator or owner of a nursing home which
20 that is in violation of this subchapter or any rule promulgated thereunder under this
21 subchapter may be subject to the forfeitures specified in this section. If the
22 department imposes a forfeiture under this subsection, the department shall also
23 impose a penalty assessment under this subsection.

24 **SECTION 8.** 50.04 (5) (a) 1., 2. and 3. (intro.) of the statutes are amended to read:

BILL

1 50.04 (5) (a) 1. A class “A” violation may be subject to a forfeiture of not more
2 than \$250 and a penalty assessment of not more than \$10,000 for each violation.

3 2. A class “B” violation may be subject to a forfeiture of not more than \$125 and
4 a penalty assessment of not more than \$5,000 for each violation.

5 3. (intro.) A class “C” violation may be subject to a forfeiture of not more than
6 \$60 and a penalty assessment of not more than \$500. No forfeiture or penalty
7 assessment may be assessed imposed for a class “C” violation unless at least one of
8 the following applies:

9 **SECTION 9.** 50.04 (5) (a) 4. of the statutes is amended to read:

10 50.04 (5) (a) 4. Notwithstanding subds. 1., 2. and 3., if the violation or group
11 of violations results from inadequate staffing, the combined amount of the forfeiture
12 and penalty assessment that the department may assess impose shall be no less than
13 the difference between the cost of the staff actually employed and the estimated cost
14 of the staff required. The number of staff required shall be determined by the
15 provider contract, the court order, or the department, by rule, whichever is greatest.
16 The inadequate staff shall be presumed to exist from the date of the notice of
17 violation.

18 **SECTION 10.** 50.04 (5) (a) 5. a., b. and d. of the statutes are amended to read:

19 50.04 (5) (a) 5. a. A nursing home that violates a statute or rule resulting in a
20 class “A” violation and that has received a notice of violation for a class “A” “A”
21 violation within the previous 3-year period involving the same situation shall be
22 subject to a forfeiture 3 times the forfeiture amount authorized for a class “A”
23 violation and a penalty assessment 3 times the penalty assessment amount
24 authorized for a class “A” violation.

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1 b. Except as provided in subd. 5. a., a nursing home that violates a statute or
2 rule resulting in a class "A" or class "B" violation and that has received a notice of a
3 class "A" or class "B" violation of the same statute or rule within the previous 3-year
4 period may be subject to a forfeiture 3 times the forfeiture amount authorized for the
5 most recent class of violation involved and a penalty assessment 3 times the penalty
6 assessment amount authorized for the most recent class of violation involved.

7 d. The forfeiture amount and penalty assessment amounts that is are tripled
8 under this subdivision shall be the ~~amount assessed~~ forfeiture and penalty
9 assessment amounts imposed after all appeals have been exhausted. If an
10 assessment imposition of a forfeiture and penalty assessment is not contested and
11 the forfeiture is and penalty assessment are paid as provided in par. (fm), the
12 forfeiture amount and penalty assessment amounts that is are tripled is are the
13 amount assessed amounts imposed after the reduction specified in par. (fm).

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15 50.04 (5) (a) 5m. ~~Beginning on December 8, 1987, the~~ The department may
16 consider, for purposes of applying triple forfeitures and penalty assessments under
17 subd. 5., any notice of violation issued by the department ~~within the 2-year period~~
18 ~~preceding December 8, 1987, or issued by the department on or after December 8,~~
19 ~~1987~~ after December 7, 1985.

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21 and amended to read:

22 50.04 (5) (a) 6. (intro.) If a licensee fails to correct a violation within the time
23 specified in the notice of violation or approved plan of correction, or within the
24 extended correction time granted under sub. (4) (c) 4., or if a violation continues after

BILL

1 a report of correction, the department may assess upon the licensee ~~a~~ for each day
2 of the continuing violation whichever of the following is applicable:

3 a. A separate forfeiture of not more than \$10,000 \$250 and a separate penalty
4 assessment of not more than \$10,000 for a class "A" violations, and may assess a
5 violation.

6 b. A separate forfeiture of not more than \$5,000 \$125 and a separate penalty
7 assessment of not more than \$5,000 for a class "B" violations, for each day of
8 continuing violation.

9 **SECTION 13.** 50.04 (5) (b) (intro.) of the statutes is amended to read:

10 50.04 (5) (b) *Factors in assessment imposition of forfeitures and penalty*
11 *assessments.* (intro.) In determining whether to impose a forfeiture is to be imposed
12 and penalty assessment for a violation and in fixing the ~~amount~~ amounts of the
13 ~~forfeiture to be imposed and penalty assessment~~, if any, ~~for a violation~~, the following
14 factors shall be considered:

15 **SECTION 14.** 50.04 (5) (c) of the statutes is amended to read:

16 50.04 (5) (c) *Assessment Imposition of forfeitures and penalty assessments;*
17 *powers and duties of department.* The department may directly assess impose
18 forfeitures and penalty assessments provided for under par. (a). If the department
19 determines that a forfeiture and penalty assessment should be assessed imposed for
20 a particular violation or for failure to correct it, ~~it~~ the department shall send a notice
21 of ~~assessment~~ imposition of forfeiture and penalty assessment to the nursing home.
22 The notice shall specify the ~~amount~~ amounts of the forfeiture assessed and penalty
23 assessment imposed, the violation, and the statute or rule alleged to have been
24 violated, and shall inform the licensee of the right to hearing under par. (e). If the
25 department does not issue a notice of forfeiture and penalty assessment within 90

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1 days of a violation, it may not impose a forfeiture or penalty assessment for the
2 violation.

3 **SECTION 15.** 50.04 (5) (cm) of the statutes is created to read:

4 50.04 (5) (cm) *Quality-of-care improvement agreements.* If, after the
5 department imposes a forfeiture and penalty assessment under par. (c), the
6 department and a nursing home agree that instead of paying the forfeiture and
7 penalty assessment the nursing home shall spend a specified amount on specified
8 measures to improve the quality of care for nursing home residents, the department
9 shall vacate the forfeiture and penalty assessment imposed under par. (c). The
10 department may extend the time for paying a forfeiture and penalty assessment
11 under par. (f) to negotiate an agreement under this paragraph.

12 **SECTION 16.** 50.04 (5) (d) (title) of the statutes is amended to read:

13 50.04 (5) (d) (title) *Forfeiture and penalty assessment period.*

14 **SECTION 17.** 50.04 (5) (d) 1. of the statutes is amended to read:

15 50.04 (5) (d) 1. In the case of a class “B” violation, no forfeiture or penalty
16 assessment may be assessed imposed for the violation from the day following the
17 date of discovery until the date of notification. If the department fails to approve or
18 reject a plan of correction within 15 days after its receipt of a complete plan, no
19 forfeiture or penalty assessment may be imposed for the period beginning with the
20 15th day after receipt and ending when notice of approval or rejection is received by
21 the home. If a plan of correction is approved and carried out, no forfeiture or penalty
22 assessment may be assessed imposed during the time period specified in the
23 approved plan of correction, commencing on the day the plan of correction is received
24 by the department.

25 **SECTION 18.** 50.04 (5) (d) 2. (intro.) of the statutes is amended to read:

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1 50.04 (5) (d) 2. (intro.) In the case of a class “C” violation for which a notice of
2 violation has been served, a forfeiture and penalty assessment may be assessed
3 imposed for whichever of the following periods is applicable:

4 **SECTION 19.** 50.04 (5) (dm) (intro.) of the statutes is amended to read:

5 50.04 (5) (dm) (intro.) *Forfeiture and penalty assessment imposition date.* In
6 the case of a class “B” violation, the department may not assess impose a forfeiture
7 or a penalty assessment upon a nursing home until:

8 **SECTION 20.** 50.04 (5) (e) of the statutes is amended to read:

9 50.04 (5) (e) *Forfeiture and penalty assessment appeal hearing.* A nursing
10 home may contest an assessment imposition of a forfeiture and penalty assessment
11 by sending, within ~~10~~ 60 days after receipt of notice of a contested action, a written
12 request for hearing under s. 227.44 to the division of hearings and appeals created
13 under s. 15.103 (1). The administrator of the division may designate a hearing
14 examiner to preside over the case and recommend a decision to the administrator
15 under s. 227.46. The decision of the administrator of the division shall be the final
16 administrative decision. The division shall commence the hearing within 30 days of
17 receipt of the request for hearing and shall issue a final decision within 15 days after
18 the close of the hearing. Proceedings before the division are governed by ch. 227. In
19 any petition for judicial review of a decision by the division, the party, other than the
20 petitioner, who was in the proceeding before the division shall be the named
21 respondent. If, after receipt of notice of imposition of a forfeiture and penalty
22 assessment, a nursing home timely requests a hearing under sub. (4) (e) on the
23 contested action under sub. (4) for which the forfeiture and penalty assessment were
24 imposed, and requests a hearing under this paragraph on the imposition of the
25 forfeiture and penalty assessment, the hearing on the contested action under sub.

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1 (4) and the hearing on the imposition of the forfeiture and penalty assessment shall
2 be consolidated.

3 **SECTION 21.** 50.04 (5) (f) of the statutes, as affected by 2003 Wisconsin Act 33,
4 is amended to read:

5 50.04 (5) (f) *Forfeitures and penalty assessments paid within 10 days.* All
6 forfeitures and penalty assessments shall be paid to the department within 10 days
7 of receipt of notice of assessment imposition of the forfeiture and penalty assessment
8 or, if the forfeiture or penalty assessment is contested under par. (e), within 10 days
9 of receipt of the final decision after exhaustion of administrative review, unless the
10 final decision is appealed and the order is stayed by court order under s. 50.03 (11).
11 The department shall remit all forfeitures paid to the secretary of administration for
12 deposit in the school fund. All moneys collected as penalty assessments under this
13 subsection shall be credited to the appropriation account under s. 20.435 (6) (ge).

14 **SECTION 22.** 50.04 (5) (fm) of the statutes is amended to read:

15 50.04 (5) (fm) *Forfeiture and penalty assessment reduction for timely payment.*
16 If a nursing home does not contest a notice of violation under sub. (4) (e) and does not
17 contest an assessment imposition of a forfeiture and penalty assessment under par.
18 (e) for a class “A” or class “B” violation and pays the forfeiture and penalty
19 assessment to the department within 10 days after receipt of the notice of assessment
20 imposition of the forfeiture and penalty assessment, the department shall reduce the
21 amount of the assessment forfeiture and penalty assessment by 35%.

22 **SECTION 23.** 50.04 (5) (fr) of the statutes is amended to read:

23 50.04 (5) (fr) *Report to the legislature.* Annually, the department shall submit
24 a report to the legislature under s. 13.172 (2) that specifies for the previous year the
25 number of class “A” violations, the ~~amount~~ amounts of the forfeiture ~~assessment and~~

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1 penalty assessment imposed for each of those violations and, if known, the ~~amount~~
2 amounts of the forfeiture and penalty assessment actually paid and collected with
3 respect to those violations. The report shall also include an explanation for any
4 ~~assessment that was~~ imposition of a forfeiture and penalty assessment that totaled
5 less than \$2,500 for the violations specified in the report.

6 **SECTION 24.** 50.04 (5) (g) of the statutes is amended to read:

7 50.04 (5) (g) *Enforcement by attorney general.* The attorney general may bring
8 an action in the name of the state to collect any forfeiture or penalty assessment
9 imposed under this section if the forfeiture or penalty assessment has not been paid
10 following the exhaustion of all administrative and judicial reviews. The only issue
11 to be contested in any such action shall be whether the forfeiture or penalty
12 assessment has been paid.

13 **SECTION 25.** 50.04 (6) (a) of the statutes is amended to read:

14 50.04 (6) (a) *Power of department.* In addition to the right to assess impose
15 forfeitures and penalty assessments under sub. (5), the department may issue a
16 conditional license to any nursing home if the department finds that either a class
17 “A” or a class “B” violation, as defined in sub. (4), continues to exist in such home.
18 The issuance of a conditional license shall revoke any outstanding license held by the
19 nursing home. The nursing home may seek review of a decision to issue a conditional
20 license as provided under s. 50.03 (5).

21 **SECTION 26.** 50.15 of the statutes is created to read:

22 **50.15 Nursing home improvement grants.** From the appropriation
23 account under s. 20.435 (6) (ge), the department shall make grants to nursing homes
24 to fund quality-of-care improvement projects. The department shall promulgate

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1 rules that specify the eligibility criteria and application procedures for receipt of a
2 grant under this section.

SECTION 27. Nonstatutory provisions.

4 (1) NURSING HOME IMPROVEMENT GRANTS. The department of health and family
5 services shall submit in proposed form the rules required under section 50.15 of the
6 statutes, as created by this act, to the legislative council staff under section 227.15
7 (1) of the statutes no later than the first day of the 7th month beginning after the
8 effective date of this subsection.

SECTION 28. Initial applicability.

10 (1) HEARING REQUESTS. The treatment of section 50.04 (4) (e) 1. and (5) (e) of the
11 statutes first applies to requests for hearings related to a notice of violation, a report
12 notation, a plan correction, or a rejection of a plan correction that is issued on the
13 effective date of this subsection.

14 (END)



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Brian R. Purtell
Director of Legal Services

email: brian@whca.com

Kennedy, Debora

From: Liedl, Kimberly
Sent: Monday, November 24, 2003 2:07 PM
To: Kennedy, Debora
Subject: Changes (hopefully the last ones!) to nursing home bill

Hi, Debora, here are hopefully the final changes to LRB 2032/4. We'd like to do a /5 and then we're going to introduce the bill next week. The language was done by Brian Purtell with edits and the subnotes done by DHFS. We're going to go with DHFS's recommendations in the instances where they suggested something a little different than the nursing home folks - the only instance where we may not is Sections 8-10, pages 4-6 where DHFS wrote that they want higher forfeiture amounts. That section I'll talk to Rep Rhoades and Pettis about, otherwise please draft the rest.

Please feel free to give me a call if you have any questions, otherwise that is fine if you want to call Brian Purtell if you have questions on some of his writing.

Thanks again for the help,
Kimber
Office of Rep. Mark Pettis

-----Original Message-----

From: Jim McGinn [mailto:jim@whca.com]
Sent: Wednesday, November 19, 2003 11:36 AM
To: kimberly.liedl@legis.state.wi.us
Subject: LRB2032 4_Suggested revisions to LRB(2)_B Purtell and LD edits.doc

Suggested revisions to LRB-2032/4

NOTE: This set of instructions is replaced.

Section 3, page 3, lines 6-10:

Plain language: It has been agreed that this section be modified so as to avoid restricting the DHFS from being able to take licensure actions or its intermediate remedies under state law. The current language in this section of the draft should ~~remain~~ be amended to provide that, when a facility's act or omission forms the basis for both a federal deficient practice and a state violation, the department may not issue a notice of violation pursuant to sec. 50.04(4)(a), Stats., if it has cited the facility for the federal violation in a statement of deficiency. [d1] ~~However, in~~ order for the Departments to retain its authority to take licensure actions under state law, provisions within Ch. 50 need amendment to permit the Department to take federal violations into account for certain actions. Specifically, licensure revocations, suspensions under 50.03(5)(a), conditional licenses under 50.04(6), and suspension of admissions 50.04(4)(d), will need modifications along the lines of that suggested below. These subsections should be modified to allow the Department to take into account federal deficiencies that directly threatens the health, safety or welfare of a resident.

The outcome of this would be that there would be one notice of violations/statement of deficiency issued. Enforcement for federal deficiencies would follow the federal enforcement regulations. If a state violation is ~~cited~~ issued (due to the absence of a corresponding federal regulation) state forfeitures and assessments would be applicable. If enforcement action is appropriate against a facility's license, for example, a conditional license or license revocation or suspension, the Department could consider the facility's federal compliance record rather than needing to show substantial non-compliance with the provisions of Ch. 50 or the applicable administrative codes.

Given the fact that there are different definitions and levels of severity between the state and federal enforcement systems, it is not as simple as just inserting a reference to "federal law." Below are some

suggested options for creating the crosswalk between the state and federal violations so as to not restrict the Department from being able to utilize its intermediate sanctions.

To adjust for this agreement, additional amendments are needed to the bill. Specifically, 50.03(5)(a) and 50.04(d) require adjustments to reference the federal deficiencies so that these too can be taken into account for these state sanctions (the suggested language change to 50.04(6) is addressed below in the comments to section 25 of the draft).

Suggested additions:[d2]

50.03(5) Suspension and revocation of nursing home licenses

(a) Powers of department. The department, after notice to a nursing home applicant or licensee, may suspend or revoke a license in any case in which the department finds that the nursing home has *created a condition relating to the operation of the nursing home that directly threatens the health, safety or welfare of the residents of the nursing home* and substantially fails to comply with:

- (1) the applicable requirements of this subchapter and the rules promulgated under this subchapter, or
- (2) section 49.498, or,
- (3) *the applicable requirements of 42 USC 1395i-3(b), (c) or (d) or 1396r (b), (c), or (d).*

No state or federal funds passing through the state treasury may be paid to a nursing home that does not have a valid license issued under this section. ^[1]

50.04(4)(d) Suspension of Admissions. [d3]1. The department shall suspend new admissions to a nursing home if all of the following apply:

- a. The nursing home received notice of violation *in the previous 12 months* for:
 - (i) a state class "A" violation, or
 - (ii) *a federal immediate jeopardy violation*, or
 - (iii) three or more state class "B" violations in the previous 12 months, or
 - (iv) *three or more federal deficiencies at a scope and severity level of "G" or higher.*
- b. The nursing home received notices of violations *for in any 12-month period during the 3 years immediately preceding the period* specified in subd 1.a., for:
 - (i) a state class "A" violation, or
 - (ii) *a federal immediate jeopardy violation*, or
 - (iii) three or more state class "B" violations, or
 - (iv) *three or more federal deficiencies at a scope and severity level of "G" or higher.*

2. A suspension of admission under subd. 1. shall begin 90 days after a nursing home received its last notice of violation for a state class "A" or state class "B" violation or *federal immediate jeopardy violation or three or more federal deficiencies at a scope and severity level of "G" or higher* if the department determines that the violation remains uncorrected 90 days after the nursing home received the last notice of the violation....A suspension of admission shall remain in effect until the department determines that *these violations* have been corrected *by the nursing home.*

✓ **Section 5, page 3, lines 21-24:**

Retain the change from 10 to 60 days in line 21, delete the amendment contained in lines 22-24.

Sections 8-10, pages 4-6.

While there is consensus as to the effort to create a mechanism to allow for the assessment portion to go towards a quality improvement fund, concerns have been raised that the current language in the bill will sustain a challenge. Request that the drafter review similar statutes that have withstood challenge and make revisions, if necessary. The DHFS recommends retaining higher forfeiture amounts than are proposed in LRB2032/4 and providing penalty assessments based on a straight percentage of the imposed forfeiture.

✓ **Section 14, page 7-8, lines 25-2**

Modify the 90-day deadline in favor of "120 days from the date the nursing home receives the notice of violation"

✓ **Section 15, page 8**

Delete section in entirety.

Section 20, page 9, line 11.

Delete "a contested action" and replace with "the assessment of a forfeiture and penalty assessment".

✓ **Section 21, page 10, lines 5-6 and 8.**

To conform the time requirements for payment of penalties and assessments with the modified appeal deadline it is recommended that the reference to "10 days" in lines 5,6 and 8 be amended to read "60 days."

✓ **Section 22, page 10, line 19**

The reference to 10 days contained in section 50.04(5)(fm) should be amended to conform to the sixty day timeframe for consistency.

Section 25, page 11, lines 14-20

As discussed above, in order for the department to retain authority to impose intermediate sanctions, it is recommended that federal deficiencies be able to be taken into account in the issuance of a conditional license. In order to allow for such consideration, this section must be revised to allow for such consideration. Suggested language:

50.04(6) Conditional License. (a) Power of department. In addition to the right to...the department may issue a conditional license to any nursing home if the department finds:

- (1) that either a ~~state~~-class "A" or ~~state~~-class "B" violation, as defined in sub. (4) continues to exist; or
- (2) [Option 1] *a violation of 42 USC 1395i-3(b), (c) or (d) or 1396r (b), (c), or (d) that*

constitutes "substandard quality of care," as defined in 42 CFR 488.301, continues to exist.

[Option 2] a violation of 42 USC 1395i-3(b), (c) or (d) or 1396r (b), (c), or (d) with a scope and severity level of "G" or higher continues to exist.

* *[Option 3] (DHFS recommendation) a violation continues to exist that constitutes immediate jeopardy, high risk of death or substantial harm or direct threat or actual harm to a client. (See d2 and d3 comments.)*

Section 27, page 12, line 7

To provide adequate time for the development of rules implementing the improvement grants, modify the 7 month deadline to 12[d4] months.

¹¹ While not previously discussed, we may wish to consider this last provision in that there has been a change in the federal law that permits/obligates the continuation of T19 payments if a facility loses or drops Medicaid. Possible amendment: "Unless otherwise required by state or federal law, no state or federal funds..." See DHFS comment in d2.

Debra, I'm sorry
about the rush on
this draft. I just
recently got the ok
from the different
groups, otherwise I
would have gotten this
to you sooner.

Kimber

Liedl, Kimberly

I underlined the sections that DHFS had added in the errata. The red words crossed out are Brian's + DHFS.

Suggested revisions to LRB-2032/4

We're going with all of the DHFS recommendations when suggested, otherwise Brian's changes are fine. I can call Brian on this first part to get something more concise.

✓ Section 3, page 3, lines 6-10:

Plain language: It has been agreed that this section be modified so as to avoid restricting the DHFS from being able to take licensure actions or its intermediate remedies under state law. The current language in this section of the draft should ~~remain~~ be amended to provide that, when a facility's act or omission forms the basis for both a federal deficient practice and a state violation, the department may not issue a notice of violation pursuant to sec. 50.04(4)(a), Stats., if it has cited the facility for the federal violation in a statement of deficiency. ~~[d1]~~

✓ However, ~~in~~ In order for the Departments to retain its authority to take licensure actions under state law, provisions within Ch. 50 need amendment to permit the Department to take federal violations into account for certain actions. Specifically, licensure revocations, suspensions under 50.03(5)(a), conditional licenses under 50.04(6), and suspension of admissions 50.04(4)(d), will need modifications along the lines of that suggested below. These sub-sections should be modified to allow the Department to take into account federal deficiencies that directly threatens the health, safety or welfare of a resident.

The outcome of this would be that there would be one notice of violations/statement of deficiency issued. Enforcement for federal deficiencies would follow the federal enforcement regulations. If a state violation is ~~cited~~ issued (due to the absence of a corresponding federal regulation) state forfeitures and assessments would be applicable. If enforcement action is appropriate against a facility's license, for example, a conditional license or license revocation or suspension, the Department could consider the facility's federal compliance record rather than needing to show substantial non-compliance with the provisions of Ch. 50 or the applicable administrative codes.

Given the fact that there are different definitions and levels of severity between the state and federal enforcement systems, it is not as simple as just inserting a reference to "federal law." Below are some suggested options for creating the crosswalk between the state and federal violations so as to not restrict the Department from being able to utilize its intermediate sanctions.

To adjust for this agreement, additional amendments are needed to the bill. Specifically, 50.03(5)(a) and 50.04(d) require adjustments to reference the federal deficiencies so that these too can be taken into account for these state sanctions (the suggested language change to 50.04(6) is addressed below in the comments to section 25 of the draft).

Suggested additions: ~~[d2]~~

50.03(5) Suspension and revocation of nursing home licenses

✓ (a) Powers of department. The department, after notice to a nursing home applicant or licensee, may suspend or revoke a license in any case in which the department finds that the nursing home has created a condition relating to the operation of the nursing home that directly threatens the health, safety or welfare of the residents of the nursing home and substantially fails to comply with:

- (1) the applicable requirements of this subchapter and the rules promulgated under this subchapter, or
- (2) section 49.498, or,
- (3) the applicable requirements of 42 USC 1395i-3(b), (c) or (d) or 1396r (b), (c), or (d).

No state or federal funds passing through the state treasury may be paid to a nursing home that does not have a

valid license issued under this section. ~~11~~

50.04(4)(d) Suspension of Admissions. ~~11~~ 1. The department shall suspend new admissions to a nursing home if all of the following apply:

a. The nursing home received notice of violation in the previous 12 months for:

- (i) a state class "A" violation, or
- (ii) a federal immediate jeopardy violation, or
- (iii) three or more state class "B" violations in the previous 12 months, or
- (iv) three or more federal deficiencies at a scope and severity level of "G" or higher.

b. The nursing home received notices of violations for in any 12-month period during the 3 years immediately preceding the period specified in subd 1.a., for:

- (i) a state class "A" violation, or
- (ii) a federal immediate jeopardy violation, or
- (iii) three or more state class "B" violations, or
- (iv) three or more federal deficiencies at a scope and severity level of "G" or higher.

2. A suspension of admission under subd. 1. shall begin 90 days after a nursing home received its last notice of violation for a state class "A" or state class "B" violation or federal immediate jeopardy violation or three or more federal deficiencies at a scope and severity level of "G" or higher if the department determines that the violation remains uncorrected 90 days after the nursing home received the last notice of the violation....A suspension of admission shall remain in effect until the department determines that these violations have been corrected by the nursing home..

✓ Section 5, page 3, lines 21-24:

Retain the change from 10 to 60 days in line 21, delete the amendment contained in lines 22-24.

Sections 8-10, pages 4-6.

Forget this part for now - Kitty & Mark will discuss at next meeting
While there is consensus as to the effort to create a mechanism to allow for the assessment portion to go towards a quality improvement fund, concerns have been raised that the current language in the bill will sustain a challenge. Request that the drafter review similar statutes that have withstood challenge and make revisions, if necessary. The DHFS recommends retaining higher forfeiture amounts than are proposed in LRB2032/4 and providing penalty assessments based on a straight percentage of the imposed forfeiture.

✓ Section 14, page 7-8, lines 25-2

Modify the 90-day deadline in favor of "120 days from the date the nursing home receives the notice of violation"

✓ Section 15, page 8

Delete section in entirety.

✓ Section 20, page 9, line 11.

Delete "a contested action" and replace with "the assessment of a forfeiture and penalty assessment".

Section 21, page 10, lines 5-6 and 8.

To conform the time requirements for payment of penalties and assessments with the modified appeal deadline it is recommended that the reference to "10 days" in lines 5,6 and 8 be amended to read "60 days."

Section 22, page 10, line 19

The reference to 10 days contained in section 50.04(5)(fm) should be amended to conform to the sixty day timeframe for consistency.

Section 25, page 11, lines 14-20

As discussed above, in order for the department to retain authority to impose intermediate sanctions, it is recommended that federal deficiencies be able to be taken into account in the issuance of a conditional license. In order to allow for such consideration, this section must be revised to allow for such consideration. Suggested language:

50.04(6) Conditional License. (a) Power of department. In addition to the right to...the department may issue a conditional license to any nursing home if the department finds:

(1) that either a ~~state~~ class "A" or ~~state~~ class "B" violation, as defined in sub. (4) continues to exist; or

(2) [Option 1] a violation of 42 USC 1395i-3(b), (c) or (d) or 1396r (b), (c), or (d) that constitutes "substandard quality of care," as defined in 42 CFR 488.301, continues to exist.

[Option 2] a violation of 42 USC 1395i-3(b), (c) or (d) or 1396r (b), (c), or (d) with a scope and severity level of "G" or higher continues to exist.

[Option 3] (DHFS recommendation) a violation continues to exist that constitutes immediate jeopardy, high risk of death or substantial harm or direct threat or actual harm to a client. (See d2 and d3 comments.)

Section 27, page 12, line 7

To provide adequate time for the development of rules implementing the improvement grants, modify the 7 month deadline to 12[d4] months.

All DHFS comments below

While not previously discussed, we may wish to consider this last provision in that there has been a change in the federal law that permits/obligates the continuation of T19 payments if a facility loses or drops Medicaid. Possible amendment: "Unless otherwise required by state or federal law, no state or federal funds..." See DHFS comment in d2.

[d1] Linda Dawson, 11/14/03. We disagree with this sentence. The provision in Section 3 asserts that DHFS is precluded from making a "determination" that the act or omission is a violation of the State laws or rules. We prefer that the provision be amended to provide that, in the situation where an act or omission by a facility forms the basis for a federal deficiency and a state violation, the department may not issue a notice of violation for the violation of the state law or rule when a statement of deficiency is issued for a violation of the applicable federal regulations.

(Option 3)

— (ICFMRs regulated as NHs)

[d2] Linda Dawson, 11/14/03. We need to draft the language to include FDDs and NHs. Therefore, we propose the following language or terminology:

- ✓ Immediate Jeopardy: a situation in which a client is experiencing or is at imminent risk of death or substantial harm;
- ✓ High risk of death or substantial harm: a condition or occurrence relating to the operation and maintenance of a nursing home presenting a substantial probability of the death or serious mental or physical injury, harm, or impairment of a client;
- ✓ Direct Threat or Actual Harm: a condition or occurrence relating to the operation and maintenance of a nursing home that has caused injury, harm or impairment to a client or is directly threatening to the health, safety or welfare of a client.

The above language incorporates the concepts found in the definition of "substandard quality of care" and "Immediate Jeopardy" in the Federal system and the definitions of class "A" and "B" violations in the Wisconsin system. (See, sec. 50.05(4)(b)1 and 2.) As proposed, it also would apply to FDDs.

DN ✓ The provisions of sec. 50.03(5), Stats., could be amended as follows: "The department, after notice to a nursing home applicant or licensee, may suspend or revoke a license in any case in which the department finds that the nursing home has substantially failed to comply with the applicable requirements of this subchapter and the rules promulgated under this subchapter or with the federal certification laws related to the operation of a residential or health care facility in this state. No state or federal funds passing through the state treasury may be paid to a nursing home that does not have a valid license issued under this section."

Note: This provision addresses the need for a license in order to qualify for federal reimbursement. We would like additional clarification or discussion concerning the proposed amendment in footnote 1.

✓ [d3] Linda Dawson, 11/17/03. The Department proposes the following amendment of sec. 50.04(4)(d), Stats.:

Suspension of Admissions. 1. The department shall suspend new admissions to a nursing home if all of the following apply:

- a) In the previous 12 months, the nursing home received written notice of a violation of state law, administrative rule or federal law or regulation involving:
 - i) Immediate jeopardy, high risk of death or substantial harm to a resident, or a Class "A" violation, or
 - ii) 3 or more class "B" violations or situations which constitute a direct threat or actual harm.
- b) In any 12 month period during the three years immediately preceding the period specified in 1. (a), the nursing home received written notice of a violation of state law, administrative rule or federal law or regulation involving:
 - i) Immediate jeopardy, high risk of death or substantial harm to a resident, or a Class "A" violation, or
 - ii) 3 (or 2 to be consistent with the federal "double G" concept) or more class "B" violations or situations which constitute a direct threat or actual harm.

DN 2. A suspension of admission shall begin when the department determines that a nursing home remains uncorrected 90 days after the nursing home received written notice of a violation of state law, administrative code or federal law or regulation that formed the basis for department action under subd. 1. A suspension of admission shall remain in effect until the department determines that nursing home has corrected the identified violation(s). (Note: Because subd. 2 has been confusing, we are suggesting that it be revised.)

[d4] LD 11/19/03. The goal is to give DHFS one year to promulgate rules concerning the NH improvement grants.